(1) 89-456

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VINTAGE ENTERPRISES, INC.,
Debtor In Possession
Petitioner,

vs.

WAYNE JAYE and CAROLYN JAYE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

WILLIAM C. HUMPHREYS, JR.
(Counsel of Record)
TODD R. DAVID
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

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QUESTIONS PRESENTED

1. Does state law that permits unlimited punitive damages but provides no standard of proportionality, cap, or other factors to guide the factfinder and to advise the wrongdoer of the potential range of penalties violate the Due Process Clause of the Fourteenth Amendment because it is void for vagueness?

2. Does state procedural law that permits the imposition of unlimited punitive damages in the unfettered discretion of the factfinder with no standard of proportionality, cap or other limiting or guiding factors, based on a minimum burden of proof, with evidence prohibited of the defendant's financial condition violate the Due Process Clause of the Fourteenth Amendment because the procedure, viewed in its entirety, is fundamentally unfair?

3. Does state law that permits an arbitrary and unlimited amount of punitive damages and that results in a punitive award that is 25 times actual damages and forces the defendant into bankruptcy violate the Due Process Clause of the Fourteenth Amendment?

LIST OF PARTIES

In addition to the parties listed in the style of the Petition, Harold E. Cantrell was a defendant in the proceedings below. He received a favorable jury verdict, which was affirmed on appeal.

Petitioner has no parent corporation, subsidiaries, or affiliates.

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Petitioner Vintage Enterprises, Inc., Debtor in Possession, prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court entered on June 23, 1989.

OPINIONS BELOW

The opinion of the Alabama Supreme Court affirming the judgment against Petitioner for $20,000 in compensatory damages and $500,000 in punitive damages is reprinted in the Appendix, *infra* at A-1 - A-8. The opinion of the Circuit Court of Tallapoosa County denying Petitioner's post-trial motions is reprinted in the Appendix, *infra* at A-23 - A-28.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on June 23, 1989. (Appendix at A-1 - A-8.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows: "nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner Vintage Enterprises, Inc., Debtor in Possession, ("Petitioner" or "Vintage") was forced into bankruptcy by the $500,000 punitive damages award challenged in this Petition.

Vintage is a Georgia mobile home manufacturer, and Respondents Wayne and Carolyn Jaye ("Jayes" or "Plaintiffs-Respondents") are Alabama citizens, who purchased a new Vintage mobile home. In their lawsuit, filed in the Circuit Court of Tallapoosa County, Alabama, the Jayes complained of various warranty-type defects in the mobile home that caused purely economic damages of $20,000. The punitive assessment of 25 times actual damages was imposed pursuant to Alabama pattern jury instructions providing the jury with unbridled discretion to sanction a defendant in any amount it deemed proper.[1] Although this exorbitant award would be prohibited in

[1] *See* Alabama Pattern Jury Instructions, Civil 18.06, 11.03. Revelant portions of the jury charge are quoted *infra* at 3-4; *see also* Appendix I at A-45.

cases filed today in Alabama,[2] it was allowed under the unconstitutional law that controlled the trial of this case.

The following facts gave rise to the award. In the Spring of 1985, the Jayes purchased the mobile home from defendant Harold E. Cantrell, a mobile home dealer in Opelika, Alabama. After the purchase, the Jayes complained to Mr. Cantrell about certain problems with the home. When Mr. Cantrell did not resolve the dispute, the Jayes registered their complaints with Vintage. Unsatisfied with Vintage's response, the Jayes filed suit on May 30, 1986.

The gravamen of the Complaint was that Vintage knew of certain defects (*e.g.*, a faulty shower door and a thinly sprayed stipple ceiling) before the mobile home was shipped and that the failure to repair those defects was fraud. The number and severity of alleged defects increased during the trial, but the Jayes never asserted that any injury resulted from the mobile home or that any of the defects rendered it uninhabitable. Indeed, the Jayes never claimed to have missed one day of occupancy because of the alleged defects.[3]

The case was tried in March, 1988. The jury rejected the Jayes' claim against Mr. Cantrell, the local dealer who had the only direct contractual relationship with the Jayes and who had failed to cure their initial complaints. The jury, however, found in favor of the Jayes in their claim against Vintage, the out-of-

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[2] Alabama has by statute reformed its punitive damages law, providing that a punitive award may not exceed $250,000 except in extraordinary circumstances. Ala. Code §§ 6-11-20 - 6-11-30. The statutory reform further provides that punitive damages may be imposed only if there is "clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness or malice with regard to the plaintiff." Ala. Code § 6-11-20.

[3] For a complete discussion of the relevant facts, see *Brief of Appellant Vintage Enterprises, Inc.* at 3-10, Ala.Sup.Ct. Case No. 87-1390, filed February 9, 1989. (Appendix F at A-35.)

state manufacturer. As noted above, the jury awarded $20,000 in actual damages and $500,000 in punitive damages.

On the issue of punitive damages, the trial court instructed the jury as follows:

> The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. *The imposition of punitive damages is entirely discretionary with the jury.* Should you award punitive damages, in fixing the amount you must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs.

Trial Transcript at 1677 (emphasis added). These instructions were in accord with Alabama's then existing law and, in fact, were mandatory. *See* Alabama Pattern Jury Instructions, Civil 11.03, 18.06.

These amorphous jury instructions provided even less direction than the jury charge in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), that prompted Justice Brennan's observation that "guidance like this is scarcely better than no guidance at all." *Id.* at 2923 (Brennan, J., concurring). There, the jury was at least advised that it could consider the financial condition of the defendant in calculating punitive damages.[4] Alabama law, however, bars the introduction of a defendant's financial condition even as to a punitive damages claim.[5]

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[4] The *Browning-Ferris* charge allowed the jury to "take into account the character of the defendants, their financial standing, and the nature of their acts." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2923 (1989) (Brennan, J., concurring).

[5] *E.g., Southern Life & Health Ins. Co. v. Whitman*, 358 So.2d 1025, 1027 (Ala. 1978); *Ware v. Cartledge*, 24 Ala. 622 (1854).

Consequently, the jury did not know about Vintage's financial condition. Had the jury seen Vintage's annual report for fiscal year-ended 1988, which was submitted to the trial court during a remittitur hearing and to the Alabama Supreme Court on appeal, they would have learned that Vintage had (1) a decrease in revenues of $6,220,883 from 1987 to 1988 and $16,998,889 from 1986 to 1988; (2) net losses of $1,758,379 for 1988, $2,228,546 for 1987, and $1,397,565 for 1986; (3) net losses per common share of stock of $.90 in 1988, $1.14 in 1987, and $.74 in 1986; and (4) a $1,830,096 decrease in working capital in 1988.

Thus, although the jury was empowered to punish Vintage, it had absolutely no idea what level of sanction was appropriate. The trial court judge referred to this procedure as "a shot in the dark." (Appendix at A-27.) In this case, the jury's shot amounted to a corporate death penalty, compelling Vintage to seek the protection of the bankruptcy court.

Vintage raised the constitutional claims here presented in its motion for judgment notwithstanding the verdict; motion for new trial; and motion for remittitur. (Appendix at A-34.)

The due process issue was again raised on appeal. Vintage attacked the $500,000 sanction as excessive under the Due Process Clause of the Fourteenth Amendment. Vintage also challenged under the Due Process Clause Alabama's former punitive damages law, arguing that it provided insufficient guidance to the decision-maker and inadequate procedural protection. (Appendix G.) On June 23, 1989, the Alabama Supreme Court affirmed the verdict and rejected Vintage's due process arguments, relying specifically upon a decision rendered the same day in a companion case — *Industrial Chemical & Fiberglass Corp. v. Chandler,* Nos. 86-381, 86-385 (Ala. June 23, 1989). (Appendix at A-7.)

In an ironic touch, an article on the Alabama Supreme Court's ruling was published by the *Wall Street Journal* directly

under an article on the *Browning-Ferris* decision. The Journal explained that Vintage had secured the judgment pending appeal by giving the Plaintiffs-Respondents a first priority lien on the Vintage plant in Henderson, North Carolina. (*Wall Street Journal,* June 27, 1989 at A3, col. 1.)

Facing a foreclosure action in North Carolina, and seeking to salvage its business in the wake of the Alabama Supreme Court's ruling, Vintage sought the protection of the United States Bankruptcy Court pursuant to Chapter Eleven of Title Eleven of the United States Code. *In re Vintage Enterprises, Inc.,* Case No. 89-09326 (Bankr. Ct. N.D.Ga., filed August 25, 1989). (Appendix H at A-43.) Vintage's inability to continue normal operations because of the punitive award forced a shutdown of the Henderson plant, which employed 150 people. It is not clear when or if that plant will reopen.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The "skyrocketing" of punitive damages awards and their deleterious effects have been well-chronicled; businesses have been devasted by huge awards and products have been driven from the market by actual or potential assessments of staggering dimension.[6] Such results are patently arbitrary in light of the meager jury direction and procedural protection provided as to punitive damages claims in many states. Simply stated, such laws lead to dramatic social and economic consequences based on nothing more than whim and caprice.

Last term, this Court held that the Eighth Amendment is inapplicable to punitive damages awards in cases between private parties. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989). In so holding, the Court expressly left open the issue "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any statutory limit." *Id.* at 2921. Several members of the Court have, in fact, expressed grave doubt that the substantive and

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[6] *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2923 (1989) (O'Connor, J., concurring in part and dissenting in part); *see also, e.g.*, Peterson, Sharma & Shanley, *Punitive Damages — Empirical Findings* (Rand R-3311-ICJ 1987); Willard & Willmore, *An Update on the Liability Crisis* (1987); Brody, *When Products Turn into Liabilities*, Fortune (March 3, 1986); Mahoney, *Punitive Damages: The Courts Are Curbing Creativity*, The New York Times, Section 3 Page 3 (December 11, 1988); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

procedural law of punitive damages satisfies due process.[7] *Id.* (Brennan, J., concurring); *id.* (O'Connor, J., concurring in part and dissenting in part); *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment). For at least three reasons, this case presents the opportunity to resolve this issue.

First, unlike three recent cases in which the Court has indicated its interest in this issue,[8] this case involves a due process claim that was briefed and decided below. Vintage presented its due process challenge to both the trial court and the Alabama Supreme Court. In a companion case, *Industrial Chemical & Fiberglass Corp. v. Chandler,* Nos. 86-381, 86-385 (Ala. June 23, 1989), the Alabama Supreme Court issued a thorough opinion on the due process issue. *Chandler* was decided the same day as Petitioner's appeal to the Alabama Supreme Court, and, as to Petitioner's due process argument, the Alabama Supreme Court specifically incorporated its *Chandler* opinion. *Vintage Enterprises, Inc. v. Jaye,* No. 87-1390 (Ala. June 23, 1989).

Second, this case illustrates vividly the problems inherent in the punitive damages regime followed in many jurisdictions. Plaintiff-Respondents sought only $20,000 in actual damages.

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[7] Although *Browning-Ferris* declined to apply the Eighth Amendment to punitive damages awards in private civil actions, it is clear that the Due Process Clause is applicable to such actions. *E.g., Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). The dictates, however, of due process in this context have vexed and divided the lower courts, and this Court should end the resulting uncertainty. *See, e.g., Jordan v. Clayton Brokerage Co.,* 861 F.2d 172 (8th Cir. 1988); *Leonen v. Johns-Manville Corp.,* 1989 W.L. 75938 (D.N.J. July 5, 1989); *Juzwin v. Amtorg Trading Corp.,* 705 F.Supp. 1053 (D.N.J. 1989).

[8] *Browning-Ferris Indus. v. Kelco Disposal, Inc.,* 109 S.Ct. 2909 (1989); *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986).

Yet, based on this relatively modest property damage claim, the jury imposed a $500,000 sanction that drove Vintage into Chapter 11 bankruptcy proceedings.

Third, the former Alabama law that controlled this case was, in the main, consonant with the unconstitutional law of many jurisdictions. At the same time, Alabama has reformed its punitive damages law to correct the constitutional flaws. Ala. Code §§ 6-11-20 - 6-11-30. Thus, this case features the juxtaposition of a constitutionally deficient law and a curative statute.

Under former Alabama law, the jury was provided no guidance whatsoever in calculating a punitive award. Indeed, the jury had the power to impose punitive damages in any amount it desired. This type of standardless and limitless law violates due process because it is void for vagueness, because it allows for excessive awards, and because it creates an inordinate risk of error.

Two aspects of Alabama law exacerbated the risk of error resulting from the jury's boundless discretion. To recover punitive damages, the Plaintiffs-Respondents were required to satisfy only a minimum burden of proof. Furthermore, Alabama law prohibits evidence of the defendant's financial condition. Thus, in the words of the trial court judge, the jury was forced to take "a shot in the dark" regarding the award needed to mete out a just punishment.[9]

Petitioner Vintage does not suggest that any one of the foregoing factors in itself rendered unconstitutional Alabama's former law, but rather that, viewed in its entirety, it was fundamentally unfair.[10] Nor does Vintage suggest that it would be

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[9] Appendix at A-27.

[10] "Due process" is, after all, a singularly flexible concept, and procedures should ordinarily be judged as a whole. *E.g., Morrissey v. Brewer,* 408 U.S. 471, 481 (1971); *see also Santosky v. Kramer,* 455 U.S. 745, 774-75 (1982) (Rehnquist, J., dissenting).

wise or proper for this Court to draft uniform punitive damages law for the fifty states. Such an approach would not only violate the states' right to establish their own law, but would also preclude the state-by-state experimentation prized under our federalist system.

This Court stands as the final arbiter of whether the Due Process Clause has been satisfied.[11] That role, however, need not conflict with state prerogatives, for it requires merely a statement of the minimum requirements of fundamental fairness, not an Alpha and Omega of punitive damages law and procedure.[12] Identifying the constitutional violations in former Alabama law will provide states with sufficient direction to formulate reforms uniquely suited to their needs.

Three specific flaws in Alabama's former punitive damages law are addressed in this Petition: (1) it was void for vagueness; (2) it provided inadequate procedural safeguards; and (3) it allowed excessive punitive assessments. Below Petitioner will address each flaw in turn.

II. FORMER ALABAMA PUNITIVE DAMAGES LAW WAS VOID FOR VAGUENESS BECAUSE IT FAILED TO NOTIFY DEFENDANTS OF THE RANGE OF PENALTIES AND BECAUSE IT FAILED TO GUIDE THE JURY'S DISCRETION IN CALCULATING AN AWARD.

Due process requires that a law explain in comprehensible terms any prohibited or mandated conduct and any penalties for failure to comply with the law. *E.g., Baggett v. Bullitt,* 377 U.S. 360 (1964); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). This principle has been described by Justice Marshall as follows:

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[11] *E.g., Vitek v. Jones,* 445 U.S. 480, 491 (1980).

[12] *E.g, Morrissey v. Brewer,* 408 U.S. 471, 489-90 (1971).

> It is a fundamental tenet of due process that 'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes'. . . . So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.

United States v. Batchelder, 442 U.S. 114, 123 (1979) (citations omitted); *see also Kolender v. Lawson,* 461 U.S. 352 (1983). A law violating this "fundamental tenet" will be declared "void for vagueness." *Batchelder,* 442 U.S. at 123; *Lawson,* 461 U.S. at 357-58.

Although *Batchelder* considered the void for vagueness doctrine in the criminal context, it also applies to civil laws. *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403 (1966); *Baggett,* 377 U.S. at 360; *Barsky v. Board of Regents,* 347 U.S. 442 (1954); *A.B. Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 239 (1925). *Giaccio* involved a Pennsylvania statute allowing the jury in a misdemeanor case to tax the defendant with costs even if he prevailed. Appellant contended that the statute was void for vagueness because it failed to provide the jury with guidance or limits in deciding whether and in what amount to tax costs. The Pennsylvania Supreme Court disagreed, holding that the provision was more akin to a civil penalty than to a criminal statute. *Commissioner v. Giaccio,* 415 Pa. 139, 202 A.2d 55 (1965).

Rejecting the Pennsylvania Supreme Court's analysis, this Court made clear that the void for vagueness doctrine applies to civil cases:

> admission of an analogy between the collection of civil costs and collection of costs here does not go far towards settling the Constitutional question before us. . . . Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this pro-

> tection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this State Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague.

Giaccio, 382 U.S. at 402.

To withstand void for vagueness analysis, a law "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *see also Lawson*, 461 U.S. at 357; *United States v. Evans*, 333 U.S. 483, 486 (1948); *Lanzetta*, 306 U.S. at 453. In addition to ensuring adequate notice, the doctrine bars laws that are defined and enforced at the sole discretion of the decision-maker. *Lawson*, 461 U.S. at 357-58; *Giaccio*, 382 U.S. at 402-403.

Following these principles, the *Giaccio* Court struck down the Pennsylvania cost statute because it "contain[ed] no standards at all, nor [did] it place any conditions of any kind upon the jury's power to impose costs upon a defendant. . . ." 382 U.S. at 403 (emphasis added).[13]

Judged under the foregoing precedent, Alabama's former law was unconstitutionally vague. The applicable Alabama pattern jury instructions provided absolutely no direction as to the range of penalties or the method of calculation. The jury was instructed solely that

[13] *See also Evans*, 333 U.S. at 486 (immigration statute overturned because, although the offense was defined clearly, the penalty provision was not); *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053, 1055 (D.N.J. 1989) (holding that standardless punitive damages law violates due process and noting that "[c]ertainly, no criminal statute would be tolerated which left to a judge or a jury the unfettered discretion to determine what penalty would be appropriate in any given case").

> *the imposition of punitive damages is entirely discretionary with the jury*. Should you award punitive damages, in fixing the amount you must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs.

Alabama Pattern Jury Instruction, Civil 11.03 (emphasis added). Several Justices have recognized the constitutional flaws in such instructions.

Justice Brennan, assessing a remarkably similar jury charge under Vermont law, concluded that

> Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.

Browning-Ferris, 109 S.Ct. at 2923 (Brennan, J., concurring).

In *Bankers Life*, Justice O'Connor found fault with coterminous Mississippi law.

> As the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.' This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.

108 S.Ct. at 1655 (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted).

Justice Marshall expressed concern about the arbitrary nature of punitive damages law almost twenty years ago. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J.,

dissenting); *see also Electrical Workers v. Foust,* 442 U.S. 42, 50 (1979); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 349-50 (1974).

It is manifest that Alabama's former law was void for vagueness. Based on ill-defined concepts of "malice" or "oppression," the jury was given a blank check on the defendant's account. There was no limit to the amount of the sanction and no standard or established method for calculating the award. Plainly, such a law failed to provide adequate notice to the defendant and failed to guide the decision-maker's discretion. Therefore, the former Alabama law challenged here was void for vagueness.

III. FORMER ALABAMA PUNITIVE DAMAGES LAW VIOLATED DUE PROCESS BY FAILING TO PROVIDE FUNDAMENTALLY FAIR PROCEDURES.

The dictates of procedural due process vary according to the particular decision and procedure at issue. *E.g, Little v. Streater,* 452 U.S. 1, 5 (1981); *Lassiter v. Dept. of Social Services,* 452 U.S. 18 (1981); *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). The critical inquiry is whether the controlling procedures are "appropriate to the nature of the case." *Boddie v. Connecticut,* 401 U.S. 371, 377-78 (1970).

In *Eldridge,* the court set forth the now familiar inquiry for assessing the fairness of procedures.

> Identification of the specific dictates of due process requires consideration of three distinct facts: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.[14]

The first *Eldridge* factor requires a comparison of the nature and weight of the parties' respective rights. Under this factor, if the party seeking to retain the property at issue has a greater interest than the party seeking to obtain the property, substantial safeguards should be afforded to the individual whose interest is threatened. *Santosky v. Kramer,* 455 U.S. 745, 758 (1982); *Goldberg v. Kelley,* 397 U.S. 254, 262-63 (1970).

The defendant's interest in a punitive damages case is plainly superior to that of the plaintiff. That superiority is demonstrated by comparing punitive damages with compensatory relief. In a prayer for compensatory damages, both sides may lay equal claim to the property at issue. The plaintiff avers that he is due a certain sum as compensation, and the defendant denies that compensation is due. In a prayer for punitive damages, however, the plaintiff, as an individual, has no protected interest in the defendant's property. In theory, the plaintiff seeks to fulfill solely a public function. "Punitive damages are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence.' " *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1655 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Gertz v. Welch, Inc.,* 418 U.S. 323, 350 (1974)).[15] Thus, if a plaintiff loses a claim for

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[14] There is legitimate debate as to whether the *Eldridge* test may be employed to assess each individual component of a hearing or must be applied to the procedure as a whole. *Compare Santosky v. Kramer,* 455 U.S. 745 (1982) *with id.* at 770 (Rehnquist, J., dissenting). That debate is irrelevant here, however, because the challenged procedure is constitutionally inadequate whether it is considered as a whole or whether each component is examined.

[15] At least one state has expressly asserted its interest by directing that 75% of a punitive award must go to the state's coffers. O.C.G.A. § 51-12.5.1(c)(2).

punitive damages, he still may be made whole for any actual loss through a verdict for compensatory damages. As one court has noted, "[p]unitive awards go to the fortuitous plaintiff. In many instances, it is a windfall." *Juzwin,* 705 F.Supp. at 1055; *see also Electrical Workers v. Foust,* 442 U.S. 42, 50 (1979).

While the plaintiff lacks an individual interest in punitive damages, the defendant has a substantial interest in avoiding such claims. Where, as here, the controlling law fails to limit the amount of punitive damages, an award in a single case can have staggering impact.[16]

Thus, the first *Eldridge* factor suggests that heightened safeguards should apply to punitive damages claims because the defendant's interest dwarfs that of the plaintiff.

The second — and most important — *Eldridge* factor focuses on the fairness and reliability of the existing procedures and the probable value of additional procedural safeguards. 424 U.S. at 335. Former Alabama punitive damages law contained no safeguards to insure either fairness or reliability. There were no standards to guide the jury in determining the amount of punitive damages. There was no limit to the award and no guidance as to an acceptable range of awards or appropriate relationship between the actual and punitive damages. The risk of error inherent in this unfettered and unguided discretion was compounded because a minimum standard of proof controlled and because the jury was prohibited from considering the financial condition of defendant.

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[16] The most shocking award is undoubtedly the $3 billion assessment in the Texaco-Pennzoil litigation. *Texaco v. Pennzoil Co.,* 729 S.W.2d 768 (Tex. 1987), *cert. denied,* 108 S.Ct. 1305 (1988). That award — although higher than others — reflects a trend, not an aberration. In the first half of 1985, a total of $242 million in punitive damages was awarded in five California cases. Jeffries, *supra,* 72 Va. L. Rev. at 145; *see also, e.g.,* Peterson, Sharma, & Shanley, *Punitive Damages — Empirical Findings* (Rand R-3311-ICJ 1987).

The absence of standards guiding the exercise of discretion increases the risk of error and, thus, has been viewed as grounds for elevating the level of procedural protection. *See Eldridge,* 424 U.S. at 343-47; *Goldberg,* 424 U.S. at 345. In *Santosky,* for example, this Court mandated heightened procedural safeguards for civil cases in which the state seeks to terminate parental rights because, *inter alia,* of "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." 455 U.S. at 762. While, within the dictates of the void for vagueness doctrine, a state is free to grant the factfinder broad discretion, additional procedural protection is required where such a course is followed. *E.g., Santosky,* 455 U.S. at 762; *Goldberg,* 397 U.S. at 269. By the same token, where a decision turns on well-defined factors, fewer safeguards are mandated. *Compare Eldridge,* 424 U.S. at 344-45 *with Goldberg,* 397 U.S. at 269.

In punitive damages cases, due process could be satisfied by suitable direction to the factfinder in the form of either a finite cap or meaningful jury instructions. Although Alabama's current law provides a statutory cap for punitive damages,[17] the law under which this case was tried provided no standards at all. Nor were there any other procedural safeguards to diminsh the profound risk of error. Two safeguards in particular might well satisfy due process even absent a cap or formula for calculating punitive awards: (1) an intermediate burden of proof; and (2) an appropriate method for allowing evidence of the defendant's financial condition.

As noted above, punitive damages claims in Alabama were, before the statutory reform, controlled by a minimum standard

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[17] Pursuant to Ala. Code § 6-11-21, punitive damages may not exceed $250,000 unless there is a pattern or practice of intentional, wrongful conduct or there was actual malice.

of proof.[18] Alabama Pattern Jury Instructions, Civil 18.06, 8.00. Although this standard suffices for compensatory damages claims, *In re Winship,* 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring), this Court has held that a more demanding standard of proof must be applied in certain categories of civil cases. *Id.* (juvenile court); *Santosky,* 455 U.S. at 745 (termination of parental rights); *Addington v. Texas,* 441 U.S. 418 (1979) (civil commitment); *Woodby v. Immigration & Naturalization Service,* 385 U.S. 276 (1966) (deportation); *Chaunt v. United States,* 364 U.S. 350, 353 (1960) (denaturalization); *see also Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) (libel); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) (same); *cf. also Speiser v. Randall,* 357 U.S. 513, 523-24 (1958) (allocation of burden of proof in tax abatement proceedings).

There are three commonly employed burdens of proof: the "beyond a reasonable doubt" standard controlling criminal cases, the "preponderance of evidence" standard controlling most civil cases, and the "clear and convincing evidence" standard. *Addington,* 441 U.S. at 423-24. The third standard, known as the "intermediate standard," is less commonly used, but nonetheless 'is no stronger to the civil law.' " *Id.* at 424 (citations omitted).

Due process precedent teaches that the factors relevant to determining the proper burden of proof are similar to the *Eldridge* factors: (1) the parties' respective interests; (2) the risk to each party of an erroneous and adverse decision; and (3)

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[18] The Alabama statutory reform provides that "[p]unitive damages may not be awarded in any civil action . . . other than in a tort action where it is proven by *clear and convincing evidence* that the defendant consciously or deliberately engaged in oppression, fraud, wantonness or malice with regard to the plaintiff." Ala. Code § 6-11-20(a) (emphasis added); *see also* Cal. Civil Code § 3294; Colo. Rev. Stat. § 13-25-127; Ky. Rev. Stat. 411.186; Okla. Stat. Tit. 23 § 9A; Utah Code Ann. § 78-18-1(1)(a).

society's interest. *See id.; Winship,* 397 U.S. at 371-72 (Harlan, J., concurring). These factors dictate applying an intermediate burden of proof to punitive damages claims where other safeguards reducing the risk of error are lacking.

As to the first factor, as discussed above, the plaintiff in a punitive damages case has no individual claim on the defendant's property, but the defendant's weighty interest is apparent. *See supra* at 15-16. For that reason alone, the second factor also suggests the intermediate burden should apply absent other safeguards.[19] Moreover, an intermediate burden of proof should apply when, beyond the potential loss of money, the defendant faces a risk of damage to his reputation. *Santosky,* 455 U.S. at 756; *Addington,* 441 U.S. at 424. Consequently, the intermediate burden traditionally has been applied where, as here, the underlying claim involves allegations of fraud.[20] *Id.* at 429; *see also* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va. L. Rev. 269, 281-83 (1983).

As to the third factor — society's interest — an incorrect jury verdict for a defendant in a punitive damages case has minimal social costs. If the conduct that should have authorized punitive damages was isolated, the failure to punish is not

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[19] These factors distinguish this case from *Herman & McClean v. Huddleston,* 459 U.S. 375 (1983). There, the minimum standard of proof was approved for Section 10b claims because plaintiffs in such actions have substantial individual interests in recovering fraudulently induced losses and because "[d]efrauded investors are among the very individuals Congress sought to protect in the securities laws." *Id.* at 390.

[20] Another factor compounding the risk of error in this case was that, unlike standard common law jurisdictions, *see Addington,* 441 U.S. at 423-24, Alabama does not require that fraud claims be established by clear and convincing evidence. *See* Alabama Pattern Jury Instructions, Civil 18.06.

significant. If the conduct is part of a pattern, society's interest can be vindicated through subsequent lawsuits, legislation, or civil or criminal state prosecution. At the same time, an erroneous punitive damages verdict against a defendant can have socially deleterious consequences. *See supra* at 7, note 6.

Therefore, although an intermediate burden of proof may not be required under all punitive damages regimes, the absence of meaningful standards under former Alabama law rendered the risk of error so great that an elevated burden of proof was necessary. *See Santosky,* 455 U.S. at 762.[21] As noted above, the risk of error was further enhanced because Alabama law bars evidence of the defendant's financial condition even as to punitive damages claims. *Southern Life & Health Ins. Co. v. Whitman,* 358 So.2d 1025, 1027 (Ala. 1978); *Ware v. Cartledge,* 24 Ala. 622 (1854).

The right to present relevant evidence and witnesses is a *sine qua non* of due process. *E.g., Little v. Streater,* 452 U.S. 1 (1981); *Morrissey v. Brewer,* 408 U.S. 471, 489-90 (1971); *Goldberg v. Kelley,* 397 U.S. 254 (1970); *Greene v. McElroy,* 360 U.S. 474, 496-97 (1959). Alabama's exclusion of evidence of the defendant's finances sharply curtails that right. *Little* suggests that, when considered in light of the entire former Alabama procedure, this evidentiary rule violates due process.[22]

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[21] In *Santosky,* the intermediate burden of proof was required because, *inter alia,* the law at issue turned on "imprecise substantive standards that [left] determinations unusually open to the subjective values of the judge." 455 U.S. at 762.

[22] This Court has often considered due process and equal protection challenges to evidentiary rules. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Vlandis v. Kline,* 412 U.S. 441 (1972); *Stanley v. Illinois,* 405 U.S. 645 (1972). In the companion case to Petitioner's appeal before the Alabama Supreme Court, however, the due process challenge to this evidentiary rule was rejected. *Industrial Chemical & Fiberglass Corp. v. Chandler,* Nos. 86-381, 86-385 (Ala. June 23, 1989). (Appendix at A-12 - A-15.)

In *Little,* an indigent defendant in a Connecticut paternity action argued that the state must bear the cost of blood grouping tests. This Court agreed because (1) of the various procedural obstacles facing such defendants; (2) the punitive nature of paternity proceedings; and (3) the unique evidentiary value of such tests on the issue of paternity. 452 U.S. at 6-14.

The parallels between *Little* and the instant case are notable. Petitioner's procedural due process claim, like the claim presented in *Little,* rests on the cumulative effect of the procedural components involved. In addition, here, as in *Little,* the proceedings were punitive.

More importantly, here, as in *Little,* the evidence in question has unique probative value. The trial court judge recognized the problem of imposing punishment without considering the defendant's financial condition:

> Since juries have no idea of the financial worth of a defendant, one might logically argue that any award of punitive damages is a shot in the dark. A damages award of $10,000 might serve as more punishment of one defendant than a damages award of $1,000,000 against another defendant.

(Appendix at A-27.)

Thus, due process dictates that evidence of the defendant's financial condition should be admissible as to punitive damages claims. In fact, most jurisdictions do allow such evidence. *See, e.g.,* C. Gamble, *Alabama Law of Damages* § 37-9 at 491, n.7 (2d ed. 1988).

There is, to be sure, a risk of prejudice if the financial evidence is submitted before the jury decides the issue of liability. The proper prophylactic measure to prevent such prejudice, however, is not excluding the evidence, but rather is bifurcating the trial. As one commentator has noted, trials would more likely lead to just results if evidence relevant to punitive

damages were heard only after the factfinder heard the underlying claim and found liability.

> Bifurcation of this kind undoubtedly reduces some of the risk of erroneous verdicts. [I]t ensures that, when the jury considers liability and compensatory damages issues, it will not have heard inflammatory evidence of wealth and malice that is admissible only on the punitive damages issues.

Wheeler, *supra,* 69 Va.L.Rev. at 300-301; *see also* N.J. Rev. Stat. § 2A:58C-5b; Kan. Stat. Ann. § 67-3701; Mo. Rev. Stat. § 510.263.

In sum, the second *Eldridge* factor — the risks of current procedures and the benefits of reform — strongly supports Petitioner's due process challenge. Without a cap on awards or standards for calculation, the jury is left with "little more than an admonition to do what they think best." *Browning-Ferris,* 109 S.Ct. at 2923 (Brennan, J., concurring). Providing meaningful guidance to the factfinder would, in itself, substantially reduce the risk of error. Alternatively, a state must address other factors compounding the risk of error — the minimal burden of proof and the procedure for considering evidence regarding the defendant's financial condition.

The third *Eldridge* factor is "the administrative burden and other societal costs" attendant to the procedural reforms advocated. 424 U.S. at 347. Little needs to be said regarding this factor. Society's prime concern in a punitive damages case is that a just result be reached and that unnecessary or excessive punishment be avoided. Thus, the third *Eldridge* factor is largely subsumed within the second.

Under the third *Eldridge* factor, the Court should also consider the administrative burdens for the state if reform were required. *Id.* In this respect, *Logan,* 455 U.S. at 435, is squarely on point. There, the state had abandoned the challenged pro-

cedure, thus "demonstrating that it no longer ha[d] any appreciable interest in defending" it. *Id.* As has been noted throughout this Petition, Alabama has reformed its punitive damages law, and Petitioner advocates nothing more than the safeguards Alabama currently provides. *See* Ala. Code §§ 6-11-20 — 6-11-30.

IV. FORMER ALABAMA PUNITIVE DAMAGES LAW VIOLATED DUE PROCESS BY ALLOWING THE TYPE OF EXCESSIVE SANCTION IMPOSED IN THIS CASE.

In *Browning-Ferris,* Justice Blackmun, writing for the Court, noted that "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme . . . ." *Browning-Ferris,* 109 S.Ct. at 2921. In a concurring opinion, Justice Brennan stated the following: "the Due Process Clause forbids damages awards that are 'grossly excessive,' . . . or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable . . . .'" *Id.* at 2923 (Brennan, J., concurring).

Several cases reflect the principles Justice Blackmun and Justice Brennan expressed. *Missouri Pacific Railway Co. v. Tucker,* 230 U.S. 340 (1912), considered a Kansas statute creating a private right of action to enforce a maximum rate schedule for common carriers. Any person charged in excess of the maximum rate had the right to "the sum of five hundred dollars as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee. . . ." *Id.* at 346. This Court overturned the Kansas statute, observing that "this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here." *Id.* at 348.

Similarly, *St. Louis Iron and Mountain Railway v. Williams,* 251 U.S. 63, 66 (1919), held "that [the Due Process Clause] places a limit upon the power of the States to prescribe penalties for violations of their laws . . . ." *See also Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 111 (1909) ("We can only interfere with . . . legislation and judicial action of the State's enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law"); *Missouri Pacific Railway Co. v. Humes,* 115 U.S. 512, 522 (1885) (due process challenge to a civil penalty rejected because "[t]he statute . . . fixes the amount of penalty in damages proportionate to the injury inflicted").

These cases illustrate that, even where a legislature has deliberately selected a range of penalties, its judgment is subject to review. In this case, there was no reasoned limit or calculation underlying the penalty; instead, the $500,000 assessment was imposed pursuant to wholly standardless instructions. Because the Due Process Clause shields against arbitrary action, there is every reason to "look harder and longer at an award of punitive damages based on . . . skeletal guidance than . . . at one situated within a range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris,* 109 S.Ct. at 2923 (Brennan, J., concurring).

Former Alabama law fails under these precepts. It allowed awards that were arbitrary, excessive, and disproportionate to any harm alleged. There was no allegation that the Jayes' mobile home caused or posed risk of injury. Nor was there any assertion that the alleged defects were part of a pattern. Thus, under the facts presented, no policy supported the excessive sanction that drove Vintage into bankruptcy.

Indeed, the award was, by definition, arbitrary. As discussed, Alabama law excludes evidence of the defendant's finances. *Southern Life & Health, Ins. Co. v. Whitman,* 358 So.2d 1025, 1027 (Ala. 1978). This evidentiary rule leads to random and ir-

rational punishment. It also leads to financially devastating awards like the one here. Such awards violate the Due Process Clause's guarantees of reasonable, proportionate punishment and financial viability. *See* Jeffries, *supra*, 72 Va. L. Rev. at 156.

Not only did former Alabama law allow punishment that was excessive in light of the defendant's financial condition, but it also allowed punitive awards bearing absolutely no relation to the damages alleged. The ratio of actual to punitive damages was 25 to 1 in the instant case, but it could just as easily have been 100 to 1. *E.g., Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987) (303 to 1 ratio); *Browning-Ferris* (100 to 1).

Of course, it is difficult to fashion a bright line test establishing an acceptable relationship of actual to punitive damages. Petitioner suggests, however, that the civil penalties imposed for violations of federal and state statutes reflect society's judgment of the type of ratio needed for just and effective punishment. Although these statutes often address quasi-criminal wrongdoing, none would authorize any award approaching a 25 to 1 ratio. In fact, the most common multiple employed is 3 to 1.[23]

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[23] *See, e.g.*, 18 U.S.C. § 1964(c); 35 U.S.C. § 284; 31 U.S.C. § 3729(a); Alaska Rev. Stat. § 45.50; Ariz. Rev. Stat. Ann. § 44-1408; Colo. Rev. Stat. § 6-2-11; Conn. Gen. Stat. § 35-35; Fla. Stat. § 542.22.

CONCLUSION

Certain states, including Alabama, have enacted statutory reforms curing the constitutional flaws addressed in this Petition. Many others, however, remain unconvinced that reform is needed, and the lower courts are divided. Although members of this Court have expressed doubt that the type of punitive damages law at issue here can withstand due process analysis, confusion and disagreement will reign in lower courts and, more importantly, in state legislatures until this Court issues a definitive ruling. Given appropriate guidance, state legislatures can fashion appropriate — albeit varying — remedial legislation. A ruling on this petition would provide such guidance.

Accordingly, this petition should be granted.

This 14th day of September, 1989.

Respectfully submitted,

William C. Humphreys, Jr.
(Counsel of Record)
Todd R. David
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

Counsel for Petitioner

APPENDIX

APPENDIX A

OPINION OF ALABAMA SUPREME COURT

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1988-89

87-1390

Vintage Enterprises, Inc.

v.

Wayne Jaye and Carolyn Jaye

v.

87-1417

Harold E. Cantrell

Appeals from Tallapoosa Circuit Court

(CV-86-48)

June 23, 1989

JONES, JUSTICE.

The trial of this case resulted in a jury verdict in favor of Wayne and Carolyn Jaye, purchasers of a mobile home, against the manufacturer, Vintage Enterprises, Inc., and a verdict in favor of the retailer, Harold E. Cantrell, against the Jayes. Judgments were entered accordingly. Vintage appeals from the denial of its post-judgment motions for judgment notwithstanding the verdict and, alternatively, for a new trial; and the Jayes appeal from the denial of their post-judgment motion for a new trial against Cantrell. We affirm the judgments as to both appeals.

Following a hearing on the post-judgment motions, the trial court entered the following "*Hammond* order"[1]:

> "This case concerns the order, sale, manufacture, and delivery of a mobile home. The plaintiffs, Mr. and Mrs. Jaye, were in the market for a mobile home. During the course of shopping for a home, they saw a Vintage Enterprises (hereinafter "Vintage") home that they liked. However, they did not want that particular home. Eventually, they talked with defendant, Harold Cantrell (hereinafter "Cantrell") about the purchase of a home. Mr. Cantrell did not represent Vintage and had never sold a Vintage home. Cantrell told the Jayes that he could help them order a Vintage home, and he contacted Vintage for them. Mrs. Jaye dealt directly over the telephone with a Vintage representative and ordered a particular model home. In addition, she went over an options sheet with the Vintage representative and requested a number of options. Therefore, in a sense the home was a custom home. The Jayes' home was manufactured and inspected at the Vintage plant in Georgia. During the course of inspection, a number of defects were discovered. Some of these defects were corrected in the factory. However, others were not. In spite of the fact that some defects were not corrected, the home was approved for shipment and was transported to Cantrell's lot in Alabama. From there it was taken to the Jayes' property in Tallapoosa County, where it was set up. Immediately, Mrs. Jaye registered a number of complaints with the home. Some of these complaints concerned set up problems, and some were manufacture problems. A good deal of testimony was taken to establish which problems were attributable to set up and which were attributable to manufacture. Both Cantrell and Vintage set out to cure the various problems raised by Mrs. Jaye. In

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[1] *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

some cases, defects were remedied. Other defects remain. Mrs. Jaye was not satisfied with the attempted repairs and stayed in contact with Vintage. At some point, she even contacted the Better Business Bureau in Georgia, and, as a result, there was some correspondence between Vintage and the Better Business Bureau. The Jayes ultimately filed suit against Vintage and Cantrell.

"The case went to the jury on the following causes of action:

"Breach of Express Warranty as to Vintage only.

"Breach of Contract as to Cantrell only.

"Negligent or Wanton Conduct as to all defendants.

"Fraud in a number of aspects as to all defendants.

"Breach of Implied Warranties as to Cantrell only.

"Violation of Magnuson-Moss[2] as to all defendants.

"The jury returned a verdict for Cantrell and against the Jayes. The jury also returned a verdict against Vintage and in favor of the Jayes. The verdict submitted for use by the jury was a general verdict with a special interrogatory concerning the application of Magnuson-Moss. The jury responded that it found a violation of Magnuson-Moss. The jury, in returning its verdict for the Jayes, modified the form verdict by setting compensatory damages at $20,000, and punitive damages at $500,000.

"Vintage has now filed a Motion for New Trial and For Judgment Nothwithstanding the Verdict. The Jayes have filed a Motion for New Trial as to Cantrell.

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[2] The Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312.

"After considering the argument of counsel and all of the testimony, the court is satisfied that there was sufficient evidence to submit the case to the jury on all of the above enumerated counts. The court is also satisfied that sufficient evidence existed to submit the question of punitive damages [to the jury].

"The pivotal question is the excessiveness vel non of damages. Vintage maintains that the compensatory damages in this are excessive. However, for obvious reasons, counsel for Vintage concentrated his argument on the punitive damages award.

"As set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), a jury verdict may be flawed in regard to damages in two ways. First, a damages award

> " 'may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure.'

"493 So.2d at 1378.

> "Second, a verdict is flawed where it results
>
> " 'not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive.'

"493 So.2d at 1378.

"The damages in this case were far from calculation with mathematical certainty. Every item of damage was contested, and ample evidence was presented by all parties such that the jury had a wide range in determining compensatory damages. For instance, one defect claimed was insufficient ceiling cover. Vintage's expert testified that

additional cover could be sprayed on at a rather nominal cost. The Jayes' expert testified that the whole ceiling needed to be removed in order to adequately repair the ceiling. Vintage argued that the submission of [the issue of] punitive damages was unsupported by the evidence.

"Insofar as the verdict being the result of bias, passion, prejudice, corruption or other improper motive, counsel read from affidavits and exit interviews with jurors over the objection of counsel for the Jayes. At trial, several former employees of Vintage were scheduled to appear and testify. However, they did not appear and were not subject to subpoena. The main import of the exit interviews was that the witnesses' failure to appear showed a lack of concern on the part of Vintage.

"In viewing the evidence at this juncture, it is important to note that the jury conducted a view of the premises. The court was present during the view and is satisfied that the jury conducted a complete inspection. Based on the standard of review at this point, the court is satisfied that the jury could have found that:

> "(1) Vintage made improper charges for various items.
>
> "(2) Defects in the home were known to Vintage after manufacture and prior to transport.
>
> "(3) Vintage transported the home with knowledge of its defective condition.
>
> "(4) Vintage was given an opportunity to repair, but deliberately did not make a good faith effort to completely repair.
>
> "(5) As an indication of the corporate state of mind regarding this home, Vintage made misrepresentations to the Georgia Better Business Bureau.

"Counsel for Vintage argued that any defects were cosmetic and did not adversely affect the function of the home. The jury heard the testimony and saw the home. Regardless of any other person's impressions, the jury had ample testimony and observation to make up its collective mind. Consequently, the court is satisfied that the jury's finding of liability was supported by the evidence both as to Vintage and Cantrell.

"*Hammond* mentions three specific areas of inquiry. The first area is culpability. As outlined above, the court is satisfied that the jury had sufficient evidence from which to determine egregious conduct on the part of Vintage. The second area of inquiry concerns the desire of discouraging others from similar conduct. This verdict may be seen as a very strong statement by the jury that Vintage and other mobile home manufacturers should give a customer what he pays for and that a defective product should not be placed in the stream of commerce. The third area of inquiry is the impact on the parties. This is a more elusive area, especially since the jury never has any idea of the financial worth of any party. Vintage argues that $500,000 is simply a windfall for the Jayes. One of the primary criticisms of punitive damages is that imposition of punitive damages almost always results in a windfall for the prevailing party. However, under the law of damages applicable to this case, the size of the award to plaintiffs is not a determining factor. The most significant impact to be considered is the financial impact on the defendant. Since juries have no idea of the financial worth of a defendant, one might logically argue that any award of puntive damages is a shot in the dark. A damages award of $10,000 might serve as more punishment of one defendant than a damages award of $1,000,000 against another defendant. Vintage introduced, over the objection of counsel, the 1988 Annual Report of Vintage. Vintage argued that imposition of a $500,000 damages award

would fiscally cripple Vintage. The court has reviewed the Annual Report in light of the fact that plaintiffs' counsel did not have the opportunity to cross-examine anyone regarding the figures presented. This report paints a somewhat bleak picture. Even so, there is a statement in the report that a reserve has been established to satisfy this judgment. Vintage argues that this section actually means that a reserve has been established which will satisfy judgment after a substantial remittitur.

"As stated in *Hammond,* a trial judge may not substitute his judgment for that of the jury. After considering all relevant factors, the court cannot say that the verdict against Vintage was flawed.

"It is, therefore, ORDERED, ADJUDGED, and DECREED that:

"(1) The Motion for New Trial or Judgment Notwithstanding the Verdict filed by Vintage Enterprises, Inc., is hereby denied.

"(2) The Motion for New Trial filed by plaintiffs in regard to defendant Cantrell is hereby denied.

"(3) All questions regarding fees and expenses under the Magnuson-Moss claim are reserved."

After a careful study of the entire record of trial, the judgments entered following the hearing on the post-judgment motions, the allegations of error, and the excellent briefs of the parties, we find no basis for reversal; therefore, the judgment in favor of the Jayes against Vintage and the judgment in favor of Cantrell against the Jayes are affirmed. On the issue of damages, see this Court's opinion in *Industrial Chemical & Fiberglass Corp. v. Chandler,* [Ms. 88-381, -385, June 23, 1989] ____ So.2d ____ (Ala. 1989) (on rehearing).

AFFIRMED AS TO 87-1390.

AFFIRMED AS TO 87-1417.

Maddox, Almon, Shores, Adams, Houston, Steagall, and Kennedy, J.J., concur.

Hornsby, C.J., recuses.

APPENDIX B

OPINION OF ALABAMA SUPREME COURT IN COMPANION CASE

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1988-89

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1988-89

86-381

Industrial Chemical and Fiberglass Corporation

v.

Lynn B. Chandler, et al.

86-385

Industrial Chemical and Fiberglass Corporation

v.

Peggy Ann Ensley et al.

Appeals from Jefferson Circuit Court

On Application for Rehearing and Application for Stay

June 23, 1989

ADAMS, JUSTICE.

Industrial Chemical and Fiberglass Corporation, a distributor of fiberglass products and supplies, appealed from judgments based upon a jury verdict awarding Lynn B. Chandler and Peggy Ann Ensley $2.5 million each on their claims against Industrial Chemical after their husbands, Terry D. Chandler and

Dewey E. Ensley, Jr., were killed by a chemical fire that swept through a cylindrical fiberglass tank in which the men were working.

In our first opinion in this case (September 30, 1989), we held that the punitive damages award against Industrial Chemical did not violate its rights under the Eighth Amendment to the United States Constitution and that Lynn Chandler and Peggy Ann Ensley had capacity to assert claims for Industrial Chemical's breach of implied warranty. Our second opinion (January 16, 1989), after remand for an order required by *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), held that the record did not establish that the awards were excessive as a matter of law, that it was not established or reflected in the record that the verdicts were based upon bias, passion, corruption or other improper motive, and that the compensatory damages awarded for pain and suffering were not excessive.

On rehearing, Industrial Chemical argues (1) that we should stay our decision pending the United States Supreme Court's decision reviewing *Kelco Disposal, Inc. v. Browning-Ferris Indus.,* 845 F.2d 404 (2d Cir.), *cert. granted,* ____ U.S. ____ 109, S. Ct. 527 (1988), argued en banc, April 18, 1989; (2) that our decision contradicts our traditional interpretation of the wrongful death act; (3) that we should reconsider our determination that the punitive damages awarded in these cases are not sufficiently analogous to criminal punishments to warrant application of the Eighth Amendment; and (4) that we failed to address its argument that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death statute violated its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I.

Industrial Chemical argues that by granting a stay of the judgments in these cases, "the Court would relieve Industrial

Chemical of the unnecessary burden of petitioning the Supreme Court for a writ of certiorari on the Eighth Amendment issue" and "similarly, by granting a stay, this Court would relieve the plaintiffs of the unnecessary burden of having to file with the Supreme Court a brief in opposition to the petition." Thus, Industrial Chemical submits that this Court could "save valuable judicial time and resources" by granting a stay pending the Supreme Court's decision in *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, supra. Our holdings were based, however, on a thorough review of applicable case law and the application in *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524 (11th Cir. 1988), to the facts before us. *Ingraham* and *Electro Services* remain precedent, and, consequently, Industrial Chemical's convenience notwithstanding, we refuse to stay the judgments.[1]

II

Industrial Chemical submits that our decision contradicts our traditional interpretation of the wrongful death act, and that we should reconsider our holding that the punitive damages awarded in these cases are not sufficiently analogous to criminal punishments to warrant application of the Eighth Amendment. These arguments were, however, addressed in full in our first opinion, and Industrial Chemical raises no controlling matter of law or fact that was overlooked or not disposed of in that opinion. Consequently, we decline to reconsider our holdings that punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, and that the wrongful death act is not penal in effect and is not of that class of cases sufficiently analogous to criminal punishments in which they are administered to justify application of the Eighth Amendment.

---

[1] We note that the writ of certiorari was granted in *Kelco Disposal* on December 5, 1988, more than two months after our first opinion was released.

III

The final issue for review on rehearing is Industrial Chemical's assertion that we failed in our opinion to address its argument that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death act violates its rights under the Due Process Clause of The Fourteenth Amendment.

> "As the Supreme Court has repeatedly made clear, the content of due process is not limited to the specific provisions of the Bill of Rights. Nor is due process confined to criminal prosecutions; it applies to any legal proceeding or regimen by which any person may be deprived of 'life, liberty, or property.' Due process requires, in whatever context, that legal procedures be consistent with 'fundamental fairness'; that they be consonant with 'ordinary notions of fair play and the settled rules of law'; that they accord with 'traditional notions of fair play and substantial justice'; and that they not offend 'the community's sense of fair play and decency.' However phrased, the message is clear: due process mandates at all times, in all circumstances, and for all defendants, 'fundamental fairness' at the hands of the law."

J. Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 Va. L. Rev. 139, 151-52 (1986). (Citations omitted.) The command of due process in the context of punitive damages requires, however, a balance between the due process rights of both the plaintiff and the defendant.

A.

Our cases have long held that evidence of the defendant's wealth, or lack of wealth, is highly prejudicial and, therefore, inadmissible (and our cases recognize no distinction between situations involving compensatory damages and those involving punitive damages):

> "In *Ware (v. Cartledge,* 24 Ala. 622, 60 Am.Dec. 489 (1854)), the plaintiff was permitted to prove, over objection, that the defendant possessed property valued at $20,000. Reversing the trial court, this court said that if wealth of a defendant is permitted then common justice requires a converse rule to prevail in the case of poor defendants. Justice Ligon wrote that common sense revolts at the adoption of such a rule. 'For sad would be the fate of that country, whose laws conceded to the insolvent bully, seducer, or slanderer, the privilege of perpetrating his wrongs with comparative impunity, under assurance that, when sued for his practices, the damages would be graduated to his present ability to pay them, and consequently would be merely nominal. No sound principle of law tolerates such a practice.' (Citing cases.) Not only have our cases held that the wealth of a defendant is not admissible, but [they] also have held inadmissible the poverty of a plaintiff. In *Pool [v. Devers,* 30 Ala. 672 (1857),] this court said that a plaintiff's being poor is not a legitimate matter for the consideration of the jury in any point of view.
>
> "While we recognize that other jurisdictions do permit the introduction into evidence [of] the wealth of a defendant, we adhere to our rule of excluding evidence of wealth of the defendant. Even though the rule was announced by this court in 1854, we opine that it is sound today — and for the same reason. *Liability for damages cannot be determined by the economic condition of either party.* Cf. *Allison v. Acton-Etheridge Coal, Co., Inc.,* 289 Ala. 443, 268 So. 2d 725 (1972)."

Southern Life & Health Ins. Co. v. Whitman, 358 So. 2d 1025, 1026-27 (Ala. 1978). (Emphasis added.) Consequently, evidence of financial worth cannot be introduced during the factfinding process to temper or mitigate a jury's potential award without impugning the process itself. Further, finding

such evidence prejudicial and, therefore, inadmissible does not work a deprivation of the constitutional guaranty of due process: subject to the limitation that a party may not be precluded from presenting facts supporting his theory of the case, a rule of evidence constitutes due process of law if it is reasonable and affords an opportunity for defense. *Crowell v. Benson,* 285 U.S. 22 (1932).

Dean Gamble notes that "the Alabama approach with respect to the admissibility of evidence concerning the relative wealth of the defendant is a departure from that used in other jurisdictions." C. Gamble, *Alabama Law of Damages,* §37-9, at 491, n. 7 (2d ed. 1988). For example, in Florida, evidence of financial worth is admissible where punitive damages are allowable: "The purpose of the rule of evidence is to indicate to the jury [in] what amount, if any, a verdict would be proper to assess for punishment and at the same time not render the defendant bankrupt." *Tallahassee Democrat, Inc. v. Pogue,* 280 So. 2d 512 (Fla. Dist. Ct. App. 1973). Additionally, "A hundred dollar punitive liability may be sufficient punishment for a man of limited means; a hundred thousand dollar punitive liability might be inadequate for a man of great wealth. For these reasons, courts permit the plaintiff claiming punitive damages to introduce evidence showing something of the defendant's financial resources. . . ." D. Dobbs, *Handbook on the Law of Remedies,* § 39, at 218-19 (1973).

Nevertheless, policy considerations are paramount in our continued adherence to that rule of evidence first announced in *Ware v. Cartledge,* 24 Ala. 622, 60 Am.Dec. 489 (1854). For instance, a plaintiff could show himself to be poor and the defendant to be of great wealth; the sympathies of the jury would possibly be aroused, and the punitive award would reflect the economic conditions of the parties and not the liability. Conversely, a defendant could show himself to be poor and the plaintiff to be of great wealth, and concessions would be made to the "insolvent bully ... [and] damages would be graduated to

his present ability to pay them, and consequently would be merely nominal." *Ware v. Cartledge,* 24 Ala. at 626. Accordingly, we reaffirm our substantive rule of law that liability for damages cannot be determined by the economic condition of either party, and, therefore, we hold that "fundamental fairness" in the context of punitive damages does not require consideration of a wealth-based standard for their award prior to determining liability.

Further, the awarding of punitive damages is discretionary with the jury (*Roberson v. Ammons,* 477 So. 2d 957 (Ala. 1985); *Tallant v. Grain Mart, Inc.,* 432 So. 2d 1251 (Ala. 1983); *Deaton, Inc. v. Burroughs,* 456 So. 2d 771 (Ala. 1984); *Morgan v. South Central Bell Tel. Co.,* 466 So. 2d 107 (Ala. 1983); *Shiloh Const. Co. v. Mercury Const. Corp.,* 392 So. 2d 809 (Ala. 1980); and *Crum v. McGhee,* 289 Ala. 244, 266 So. 2d 855 (1972)), when there is a willful and malicious wrong, except for negligence in wrongful death cases:

> To authorize 'punitive,' 'exemplary,' or 'vindictive' damages, there must be '... negligence,' meaning such an entire want of care as to raise the presumption that the person at fault is conscious of the probable consequences of his carelessness and indifferent to the danger of injury to the person or property of others. Punitive damages are allowable for a wrong maliciously perpetrated, or where the wrongful act is done knowingly, wantonly, and recklessly, under such circumstances as to indicate that the wrongdoer knew that the act would probably injure persons or property, or where the act was so grossly negligent, oppressive, or fraudulent as to amount to malice."

C. Gamble, *Alabama Law of Damages,* § 4-1 (2d ed. 1988). (Citations omitted).

If the existence of malice, wantonness, or negligence is supported as fact by evidence in the record, "we must see no offense to the Constitution, and no deprivation of any constitutional right of [the defendant] in committing the assessment of

such damages, including the amount to be allowed, to the sound discretion of the jury." *Tools v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Malice, wantonness, and negligence cannot be found in a vacuum, and in the event that their existence as fact is not supported by evidence in the record, the defendant may remove the case or the issue from the tier of fact; see Rule 56, A.R.Civ.P., summary judgment (no genuine issue of material fact), and Rule 50 A.R.Civ.P., directed verdict and judgment notwithstanding the verdict (complete absence of proof on an issue material to the claim.)[2]

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[2] To limit the jury's discretion other than by proper instruction as to the circumstances under which punitive damages are awarded, would appear to violate the right of trial by jury guaranteed by Article I, §11, of the Alabama Constitution of 1901 ("That the right of a trial by jury shall remain inviolate"):

> "The following propositions of law, each of which is involved in this case, are deemed to be either axiomatic or undeniable:
>
> ". . . .
>
> (7) To except these individual and inalienable rights of the people out of the general powers of government is to prohibit the Legislature, the executive, or the judicial branch, one or all, from destroying or impairing such reserved rights of the people.
>
> (8) To provide that such reserved rights shall forever remain inviolate is to forbid the sovereign through the legislature, executive or judicial department, one or all, from ever burdening, disturbing, qualifying or tampering with, these rights, to the prejudice of the people."

Alford v. State, 170 Ala. 178, 54 So. 213 (1910).

See Alabama Pattern Jury Instructions 11.01 (punitive damages may be awarded "where the plaintiff reasonably satisfies the jury from the evidence that plaintiff has been (willfully or) wantonly injured or damaged by the defendant"); 11.03 (the jury must take into consideration "the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs"); and 11.18 (the jury's verdict "should be directly related to the culpability of the defendant(s) and necessity of preventing similar wrongs in the future"). *Alabama Pattern Jury Instructions — Civil* (1974).

Therefore, "fundamental fairness" at the hands of the law does not extend to the defendant the right to impugn the fact-finding process by introducing evidence of financial condition or solvency, or by limiting the jury's discretion to award punitive damages other than by proper jury instruction, at the expense of the plaintiff's right to "fundamental fairness." Consequently, standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death act to meet the command of due process must exist in post-judgment review of the jury's verdict.

B.

Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also serves to deter others from following the defendant's example. But in levying a punitive award, the degree or amount must be comparable to the act deserving punishment. And though the defendant has engaged in intolerable conduct, it does not surrender its right to "fair" punishment; in other words, "although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989), citing *Maryland Casualty Co. v. Tiffin,* 537 So. 2d 469 (Ala. 1988), *City Bank of Alabama v. Eskridge,* 521 So. 2d 931 (Ala. 1988), and *Roberson v. Ammons,* 477 So. 2d 957 (Ala. 1985). Hence, we must ask, after the return of a jury award of punitive damages, what process is due the defendant to insure that he has been provided "fundamental fairness" at the hands of the law and to insure that society's goals of punishment and deterrence have been accomplished?

> "If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled

to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal [Code 1975, § 12-22-71]. The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur [*United Services Auto. Ass'n v. Wade,* [Ms. 86-1151, Mar. 17, 1989) ____ So. 2d ____ (Ala. 1989)] and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur [*Gulf Atl. Life Ins. Co. v. Barnes,* 405 So. 2d 916 (Ala. 1981)].

"If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it [*Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986)]. And, in making the determination of whether the verdict is excessive (or inadequate), a trial court is authorized to consider the following non-exclusive list of factors:

> " ' "(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that has actually occurred. *If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.*
>
> " ' "(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and fre-

quency of similar past conduct should all be relevant in determining this degree of reprehensibility.

" ' "(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

" ' "(4) The financial position of the defendant would be relevant.

" ' "(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

" ' "(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

" ' "(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages." ' "

Central Alabama Electric Cooperative v. Tapley, [Ms. 87-1188, May 12, 1989] ____ So. 2d (Ala. 1989), quoting from *Green Oil Co. v. Hornsby,* 539 So. 2d at 223-24 (quoting in turn *Aetna Life Ins. Co. v. Lavoie,* 505 So. 2d 1050, 1062 (Ala. 1987) (Houston J., concurring)).

From these considerations (and from those reaffirmed in *Hammond v. City of Gadsden,* 493 So. 2d 1379 (Ala. 1986), emerge two related protections: First, a requirement of "reasonableness, of proportionality, of sensible relation between punishment and offense," and, second, a guarantee of "not just bare survival, but continued productive economic viability." C. Jeffries, *A Comment on the Constitutionality of Punitive Damages,* supra, at 156 (discussing Magna Charta's in-

tent to curb unlimited punitive authority). Nothing prevents the defendant, at a hearing on a motion for new trial based on an allegedly flawed jury verdict,[3] from presenting evidence to prove on or more of the above considerations, and, by doing so, to guarantee that his right to due process of law in regard to the jury's award is protected. In sum, "fundamental fairness" requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive (the plaintiff, of course, is entitled to offer proof contradicting the defendant's or, conversely, to offer proof that the award is inadequate.

Subsequently, the trial court will state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of the jury's verdict, as required by *Hammond v. City of Gadsden,* supra. The defendant may appeal, as a matter of right, from the denial of his motion for new trial, and he is entitled to a review of the verdict on appeal, where he once again may present proof as to the excessiveness of the award. See Ala. Code 1975, § 12-22-71. We emphasize, as we did in *Hammond v. City of Gadsden,* that no substantive rule of law is changed by this procedure; and "[w]e make no attempt to enumerate all of the

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[3] "[A] jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. It is only in those cases that a trial court, pursuant to A.R.Civ.P. 59(f), and this Court, pursuant to Code 1975, §12-22-71, may interfere with a jury verdict. Insofar as damages are concerned, a jury verdict may be flawed in two ways. First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. ...Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive." *Hammond v. City of Gadsden,* 493 So. 2d at 1379.

factors which may be considered by the trial court," leaving that to its sound discretion. *Hammond v. City of Gadsden,* 493 So. 2d at 1379. We do, however, reaffirm the substantive rules of law, stated in our earlier opinion in this case, "that a trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff; that a trial court may not substitute its judgment for that of the jury; *and that there can be no ironclad rule in considering the adequacy or excessiveness of a verdict. Each case must be determined by its own facts and on its own merits." Industrial Chemical & Fiberglass Corp. v. Chandler,* [Ms. 86-381, - 385, January 16, 1989] ____ So. 2d at ____ (Ala. 1989), citing *Hammond v. City of Gadsden,* supra. (Emphasis added.)

We noted in our second opinion in this case that Industrial Chemical did not provide either the trial court (on post-judgment review) or this Court with financial data evidencing and supporting its statement that it would face imminent financial destruction if the awards were allowed to stand. Further, we determined that Industrial Chemical's culpability, after a thorough review of the record, was accurately reflected by the verdicts, and that the verdicts were appropriate and desirable for discouraging similar conduct by others in the future. On rehearing, Industrial Chemical submits no argument on any of the mitigating factors listed above, and we decline to grant the application for rehearing to give it the opportunity to do so.[4] Industrial Chemical received the process due to guarantee "fundamental fairness" in the jury's verdicts, and, consequently, we find no violation of the Fourteenth Amendment as applied to the imposition of punitive damages under the wrongful death act.

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[4] Industrial Chemical chose not to submit adequate argument on this issue in its first brief as appellant, in its reply brief, its post-remand brief, or its brief in support of its application for rehearing. Industrial Chemical has been given every opportunity to "address this pressing issue," and it has not done so. We decline to allow it a fifth opportunity to do so.

OPINION EXTENDED; APPLICATIONS DENIED.

Jones, Almon, Shores, and Steagall, JJ., concur.

Maddox and Houston, JJ., concur in part and dissent in part.

Industrial Chemical v. Chandler

MADDOX, JUSTICE (Concurring in part and dissenting in part).

For my views on this case, see my concurring in part and dissenting in part opinion filed January 20, 1989, ____ So.2d ____ (Ala. 1989).

Additionally, I would stay the execution of this judgment, however, pending a decision of the Supreme Court of the United States in its review of *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 845 F.2d 404 (2nd Cir. 1988), cert. granted, ____ U.S. ____, 109 S.Ct. 527 (No. 88-556, Dec. 5, 1988).

Houston, J., concurs.

APPENDIX C

OPINION OF TRIAL COURT ON POST-TRIAL MOTIONS

IN THE CIRCUIT COURT OF
TALLAPOOSA COUNTY, ALABAMA AT DADEVILLE

CASE NO. CV-86-048

WAYNE JAYE and CAROLYN JAYE,
Plaintiffs

vs.

VINTAGE ENTERPRISES, INC.,
Defendant

HAMMOND ORDER

This case concerns the order, sale, manufacture and delivery of a mobile home. The plaintiffs, Mr. and Mrs. Jaye, were in the market for a mobile home. During the course of shopping for a home, they saw a Vintage Enterprises (hereinafter Vintage) home that they liked. However, they did not want that particular home. Eventually, they talked with defendant, James Cantrell (hereinafter Cantrell) about the purchase of a home. Mr. Cantrell did not represent Vintage and had never sold a Vintage home. Cantrell told the Jayes that he could help them order a Vintage home, and he contacted Vintage for them. Mrs. Jaye dealt directly over the telephone with a Vintage representative and ordered a particular model home. In addition, she went over an options sheet with the Vintage representative and requested a number of options. Therefore, in a sense the home was a custom home. The Jaye's home was manufactured and inspected at the Vintage plant in Georgia. During the course of inspection, a number of defects were discovered. Some of these defects were corrected at the factory. However, others were not. In spite of the fact that some defects were not corrected the home was approved for shipment and was transported to Can-

trell's lot in Alabama. From there it was taken to the Jaye's property in Tallapoosa County where it was set up. Immediately, Mrs. Jaye registered a number of complaints with the home. Some of these complaints concerned set up problems, and some were manufacture problems. A good deal of testimony was taken to establish which problems were attributable to set up and which were attributable to manufacture. Both Cantrell and Vintage set out to cure the various problems raised by Mrs. Jaye. In some cases defects were remedied. Other defects remain. Mrs. Jaye was not satisfied with the attempted repairs and stayed in contact with Vintage. At some point she even contacted the Better Business Bureau in Georgia, and as a result there was some correspondence between Vintage and the Better Business Bureau. The Jayes ultimately filed suit against Vintage and Cantrell.

The case went to the jury on the following causes of action:

Breach of Express Warranty as to Vintage only.

Breach of Contract as to Cantrell only.

Negligent or Wanton Conduct as to all defendants.

Fraud in a number of aspects as to all defendants.

Breach of Implied Warranties as to Cantrell only.

Violation of Magnuson-Moss as to all defendants.

The jury returned a verdict for Cantrell and against the Jayes. The jury also returned a verdict against Vintage and in favor of the Jayes. The verdict submitted for use by the jury was a general verdict with a special interrogatory concerning the application of Magnuson-Moss. The jury, in returning its verdict for the Jayes, modified the form verdict by setting compensatory damages at $20,000 and punitive damages at $500,000.

Vintage has now filed a Motion For New Trial and For Judgment Notwithstanding The Verdict. The Jayes have filed a Motion For New Trial as to Cantrell.

After considering the argument of counsel and all of the testimony, the Court is satisfied that there was sufficient evidence to submit the case to the jury on all of the above enumerated counts. The Court is also satisfied that sufficient evidence existed to submit the question of punitive damages.

The pivotal question is the excessiveness vel non of damages. Vintage maintains that the compensatory damages in this are excessive. However, for obvious reasons counsel for Vintage concentrated his argument on the punitive damage award.

As set forth in *Hammond v. City of Gadsden,* 493 So2d 1394 (Ala. S. Ct. 1986), a jury verdict may be flawed in regard to damages in two ways. First, a damage award

> ". . . may include or exclude a sum which is clearly recoverable or not as a matter of law or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes damages legally and mathematically ascertainable at a precise figure," 493 So2d at 1378.

Second, a verdict is flawed where it results

> ". . . not from the evidence and applicable law, but from bias, passion, prejudice, corruption or other improper motive," 493 So2d at 1378.

The damages in this case were far from calculation with mathematical certainty. Every item of damage was contested, and ample evidence was presented by all parties such that the jury had a wide range in determining compensatory damages. For instance, one defect claimed was insufficient ceiling cover. Vintage's expert testified that additional cover could be sprayed on at a rather nominal cost. The Jaye's expert testified that the whole ceiling needed to be removed in order to adequately repair the ceiling. Vintage argued that the submission of punitive damages was unsupported by the evidence.

Insofar as the verdict being the result of bias, passion, prejudice, corruption or other improper motive, counsel read from

affidavits and exit interviews with jurors over the objection of counsel for the Jayes. At trial several former employees of Vintage were scheduled to appear and testify. However, they did not appear and were not subject to subpoena. The main import of the exit interviews was that the witnesses' failure to appear showed a lack of concern on the part of Vintage.

In viewing the evidence at this juncture it is important to note that the jury conducted a view of the premises. The Court was present during the view and is satisfied that the jury conducted a complete inspection. Based on the standard of review at this point, the Court is satisfied that the jury could have found that:

(1) Vintage made improper charges for various items.

(2) Defects in the home were known to Vintage after manufacture and prior to transport.

(3) Vintage transported the home with knowledge of its defective condition.

(4) Vintage was given an opportunity to repair but deliberately did not make a good faith effort to completely repair.

(5) As an indication of the corporate state of mind regarding this home, Vintage made misrepresentations to the Georgia Better Business Bureau.

Counsel for Vintage argued that any defects were cosmetic and did not adversely affect the function of the home. The jury heard the testimony and saw the home. Regardless of any other person's impressions, the jury had ample testimony and observation to make up its collective mind. Consequently, the Court is satisfied that the jury's finding of liability was supported by the evidence both as to Vintage and Cantrell.

Hammond mentions three specific areas of inquiry. The first area is culpability. As outlined above, the Court is satisfied that the jury had sufficient evidence from which to determine

egregious conduct on the part of Vintage. The second area of inquiry concerns the desire of discouraging others from similar conduct. This verdict may be seen as a very strong statement by the jury that Vintage and other mobile home manufacturers should give a customer what he pays for and that a defective product should not be placed in the stream of commerce. The third area of inquiry is the impact on the parties. This is a more elusive area, especially since the jury never has any idea of the financial worth of any party. Vintage argues that $500,000 is simply a windfall for the Jayes. One of the primary criticisms of punitive damages is that the imposition of punitive damages almost always results in a windfall for the prevailing party. However, under the law of damages applicable to this case, the size of the award to plaintiffs is not a determining factor. The most significant impact to be considered is the financial impact on defendant. Since juries have no idea of the financial worth of a defendant, one might logically argue that any award of punitive damages is a shot in the dark. A damage award of $10,000 might serve as more punishment of one defendant than a damage of $1,000,000 against another defendant. Vintage introduced, over the objection of counsel, the 1988 Annual Report of Vintage. Vintage argued that imposition of a $500,000 damage award would fiscally cripple Vintage. The Court has reviewed the Annual Report in light of the fact that plaintiffs' counsel did not have the opportunity to cross examine anyone regarding the figures presented. This report paints a somewhat bleak picture. Even so, there is a statement in the report that a reserve has been established to satisfy this judgment. Vintage argues that this section actually means that a reserve has been established which will satisfy judgment after a substantial remittitur.

As stated in *Hammond,* a trial judge may not substitute his judgment for that of the jury. After considering all relevant factors, the Court cannot say that the verdict against Vintage was flawed.

It is, therefore, ORDERED, ADJUDGED and DECREED that:

(1) The Motions For New Trial or Judgment Notwithstanding The Verdict filed by Vintage Enterprises, Inc., are hereby denied.

(2) The Motion For New Trial filed by plaintiffs in regard to defendant Cantrell is hereby denied.

(3) All questions regarding fees and expenses under the Magnuson-Moss claim are reserved.

A copy of this Order shall be sent by the Clerk to all counsel of record.

DONE this 22 day of July, 1988.

/s/ Howard F. Bryan
Circuit Judge

APPENDIX D

TRIAL COURT JUDGMENT

Actions, Judgments, Case Notes

3/31/87

This cause came on to be heard before a duely empanneled jury. After presentation of evidence, argument and charge the jury returned the following verdicts: "We the jury find for the defendant Cantrell /s/ Leon Bush foreman and; we, the jury find for the plaintiffs and against the defendant Vintage and assess the plaintiffs' damages at $20,000 punitive $500,000 total $520,000.00 /s/ Leon Bush foreman." In response to a special interrogatory the jury answered as follows: "Did the jury in finding for plaintiffs find a violation of the Magnuson-Moss Act and were damages assessed for such violation? __X__ yes _____ no." /s/ Leon Bush foreman. It is therefore ordered, adjudged and decreed that judgment be and hereby is entered in favor of defendant Cantrell as to all issues. It is further ordered adjudged and decreed that plaintiffs have and recover of defendant Vintage Enterprises, Inc. the sum of $520,000, interest and the costs of court for which let execution issue.

/s/ Howard F. Bryan

APPENDIX E

PETITIONER'S POST-TRIAL MOTIONS

VINTAGE ENTERPRISES, INC.
Plaintiff,

vs.

WAYNE JAYE and CAROLYN JAYE,
Respondents.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT: MOTION FOR NEW TRIAL: MOTION FOR REMITTITUR

Defendant, Vintage Enterprises, Inc., moves the Court for judgment notwithstanding the verdict pursuant to Rule 50 of the Alabama Rules of Civil Procedure and, alternatively, for a new trial or remittitur pursuant to Rule 59 of the Alabama Rules of Civil Procedure and as grounds therefore says:

1. The jury verdict is clearly excessive and unjust and this Court should enter an order striking the punitive damage award of $500,000.00 or, alternatively, grant a new trial to this Defendant on all issues.

2. The jury verdict of punitive damages in the amount of $500,000.00 is not sustained by the preponderance of the evidence as there was no evidence of any gross, malicious or oppressive conduct and this Court should enter an order striking the punitive damage award or, alternatively, grant a new trial to this Defendant on all issues.

3. The jury verdict of punitive damages in the amount of $500,000.00 is contrary to the law applicable to this case and this Court should enter an order striking the punitive damage award or, alternatively, grant this Defendant a new trial on all issues.

4. The jury verdict of punitive damages was based on an absence of witnesses for which this Defendant had no control and who was notified so late of the witnesses intentions not to attend trial that is constituted an accident or surprise which ordinary prudence could not have guarded against thereby requiring this Court to set the verdict aside or, alternatively, grant this Defendant a new trial on all issues.

5. The jury verdict is so excessive in relation to Plaintiffs' injury and financial loss that it is clearly the result of and based on bias, prejudice, and improper sentiment and not based on the evidence presented and this Court is required to set the verdict aside and enter its own order or, alternatively, to grant this Defendant a new trial on all issues.

6. This Court erred in failing to grant this Defendant's Motion for Directed Verdict and the jury verdict should be set aside and this Court enter judgment in accordance with this Defendant's Motion for Directed Verdict or, alternatively, grant this Defendant a new trial on all issues.

7. The jury verdict of $500,000.00 in punitive damages is clearly excessive and this Court must remit and reduce the amount of the punitive damages and enter an order of remittitur in accordance with rule 59 of the Alabama Rules of Civil Procedure.

8. There was no evidence or insufficient evidence to support a verdict of punitive damages under Count IV of Plaintiffs' Complaint and this Court is required to set the verdict of punitive damages aside and enter an order consistent with this Defendant's Motion for Directed Verdict or, alternatively, grant Defendant a new trial on all issues.

9. There was no evidence or insufficient evidence to support a jury verdict of punitive damages under Count IV of the Plaintiffs' Complaint and this Court is required to set the verdict of punitive damages aside and enter an order consistent with this

Defendant's Motion for Directed Verdict or, alternatively, grant Defendant a new trial on all issues.

10. There was no evidence or insufficient evidence to support a jury verdict of punitive damages under Count V of the Plaintiffs' Complaint and this Court is required to set the verdict of punitive damages aside and enter an order consistent with this Defendant's Motion for Directed Verdict or, alternatively, grant Defendant a new trial on all issues.

11. There was no evidence or insufficient evidence to support a jury verdict of punitive damages under Count VI of Plaintiffs' Complaint and this court is required to set the verdict of punitive damages aside and enter an order consistent with this Defendant's Motion for Directed Verdict or, alternatively, grant Defendant a new trial on all issues.

12. There was no evidence or insufficient evidence to support a jury verdict of punitive damages under Count VII of Plaintiffs' Complaint and this Court is required to set the verdict of punitive damages aside and enter an order consistent with this Defendant's Motion for Directed Verdict or, alternatively, grant Defendant a new trial on all issues.

13. There was no evidence or insufficient evidence to support a jury verdict of punitive damages under Count X of Plaintiffs' Complaint and this Court is required to set the verdict of punitive damages aside and enter an order consistent with this Defendant's Motion for Directed Verdict or, alternatively, grant Defendant a new trial on all issues.

14. This Defendant does not have the financial ability to pay a punitive damage judgment in the amount of $500,000.00 and will be forced into bankruptcy, causing the loss of numerous jobs and defeating any legal purpose for which punitive damages can be awarded thus requiring this Court to set the verdict aside, enter its own order or, alternatively, remit the punitive damage award or grant this Defendant a new trial on all issues.

15. There was no evidence of any gross, malicious or oppressive conduct on the part of this Defendant and the jury was precluded from entering any award of punitive damages, requiring this Court to set aside the verdict of punitive damages, enter its own order, or, alternatively, remit the punitive award, or grant a new trial to this Defendant on all issues.

16. There was no evidence to support the jury verdict of punitive damages based upon misrepresentations of this Defendant; or that any statement by agents, servants or employees of this Defendant induced the Plaintiff to purchase or that Plaintiffs did, in fact, rely upon any representations of the Defendant and this Court is required to set the verdict aside or, alternatively, grant this Defendant a new trial on ali issues.

17. This court granting of a directed verdict in favor of this Defendant on Count II (Breach of Contract) of Plaintiffs' Complaint and charging the jury on and submitting to the jury Count V (misrepresentation) and Count VI (deceit) necessarily caused an inconsistent verdict and the jury verdict must be set aside or, alternatively, this Defendant must be granted a new trial on all issues.

18. There was no evidence of any intent to deceive on the part of this Defendant and absent any evidence of an intent to deceive the jury was precluded from awarding punitive damages and this Court is required to set the verdict aside, enter its own order, or alternatively grant this Defendant a new trial on all issues.

19. There was no evidence or insufficient evidence that this Defendant made representations; or that representations were made with the intention and purpose of deceiving the Plaintiffs or inducing the Plaintiffs to any act; or that Plaintiffs relied upon any representations; or that Plaintiffs sustained any loss or damages as a proximate result of the representation having been made and this Court is required to set the jury verdict aside and enter its own order or, alternatively, grant to this Defendant a new trial on all issues.

20. This Court's jury charge on innocent misrepresentation was erroneous and prejudicial and this Court is required to set the verdict of the jury aside or, alternatively, grant a new trial to this Defendant.

21. The jury form and special interrogatory prepared by the Court and submitted to the jury was misleading and prejudicial and this Court is required to set the verdict aside or, alternatively, grant Defendant a new trial on all issues.

22. The Court erred in submitting the case to the jury as to Plaintiff, Wayne Jaye, as he was not an owner of the mobile home, nor were any representatations made to him and this Court is required to set the verdict aside, enter its own order or, alternatively, grant this Defendant a new trial on all issues.

23. The Trial court erred in failing to allow Counsel for Defendant to examine Plaintiff, Wayne Jaye, as to his special pecuniary interest in the case and is required to set the verdict aside or, alternatively, to grant the Defendant a new trial on all issues.

24. The jury verdict awarding punitive damages in this case is violative of the constitutional safeguards provided to the Defendant under the due process clause of the Fourteenth Amendment to the Constitution of the United States in that punitive damages generally and in this case in particular are vague and are not rationally related to legitimate government interests.

25. The jury venire failed to respond properly to voir dire requiring this Court to set this verdict aside or grant to this Defendant a new trial.

BARNES & RADNEY, P.C.

/s/ W. Scears Barnes
W. SCEARS BARNES, JR.,
Attorney for Defendant

APPENDIX F

EXCERPT FROM PETITIONER'S ALABAMA SUPREME COURT APPELLATE BRIEF RELEVANT TO PLAINTIFFS-RESPONDENTS' FACTUAL AND LEGAL THEORIES

IV STATEMENT OF FACTS

After five months of comparison shopping, plaintiff Carolyn Jaye, who had significant work experience in the mobile home business (T at 1034),[3] and her husband, plaintiff Wayne Jaye, elected to purchase a Vintage mobile home. The home was purchased from defendant Cantrell, who was not a regular Vintage dealer; in fact, this was the first Vintage home Cantrell sold. (T at 551-52). Plaintiffs and Cantrell reviewed the options plaintiffs wanted on their home before contacting Vintage. (T at 480-82)

Prior to the sale, the sole contact between Vintage and plaintiffs was a telephone conversation between Mrs. Jaye and Bill Tucker, a Vintage employee on May 19, 1985. (T at 463-65) During that telephone conversation, Mrs. Jaye followed-up on her conversations with Cantrell regarding various features and options. (T at 463-65)

Cantrell agreed to be responsible for the "set-up" of the mobile home, and he contracted with third parties to perform the "set-up." (T at 458, 393, 1366) He charged plaintiffs $1,000 for this service. (T at 487)

"Set-up" is the process through which the components of a mobile home are assembled; the home is secured to the site; and

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[3] Mrs. Jaye had worked for Colonel Louis Pick, who owned mobile home lots and sold mobile homes. (T at 1034) She had active involvement in selling and repairing mobile homes, (T at 1034), and she told one worker on her home that she knew how work on a mobile home should be performed. (T at 1372-76)

various cosmetic touches are completed. (T at 330-48, 421) Although the basic structure of a mobile home is manufactured at the factory, the set-up involves significant construction work, ranging from installing heating ducts, to connecting structural beams, to assembling and installing interior moulding. (*See* Plaintiffs' Exhibit 15, the "Vintage Home Installation Manual" T at 331)

It was undisputed that any problems with the set-up were the dealer's (Cantrell's) responsibility, not Vintage's. (T 378, 746, 747, 781-82) In fact, the Court instructed the jury that "as to Vintage the set-up crew was an independent contractor. And Vintage would not be bound by any of the acts of the set-up crew." (T at 1669)

On June 10, 1985, the home was delivered to Cantrell's lot (T at 589), and plaintiffs had the opportunity to view and enter it before making payment on June 11, 1985. (T at 590-91) During delivery and set-up of the home, however, plaintiffs became dissatisfied with the set-up and certain aspects of the home itself. (T at 595-96)

Nonetheless, plaintiffs have never missed a day of occupancy in their Vintage mobile home. (T at 923) Nor have plaintiffs represented that the mobile home caused any injury or threat to their safety.

The record shows that defendants made repeated attempts to redress plaintiffs' complaints. (*See, e.g.,* T at 1235-53, 1273-87) In November 1985, as defendants continued their repair efforts, plaintiffs ceased communication with defendants. (T at 611) Furthermore, there was testimony, albeit disputed testimony, that plaintiffs refused to schedule further repair efforts in the winter of 1985. (T at 1472-75) In May of 1986, without further notice, plaintiffs filed the instant suit. (T at 611)

There were three types of defects addressed at trial: (1) defects that related to Vintage's manufacturing; (2) defects of

appliances under separate warranty; and (3) set-up defects for which only Cantrell could be held liable.

Plaintiffs' Exhibit 17 is a letter from plaintiffs to Vintage dated October 17, 1985. (T at 1493) It reflects the complaints plaintiffs had communicated prior to filing suit. Among those complaints were numerous alleged "set-up" defects for which only Cantrell could be held liable. Specifically, in plaintiffs' own words, the set-up defects listed in Exhibit 17 included, among other things, the following:

> The post on the divider wall between kitchen and great room is pushed through the stipple ceiling. This occurred during set-up and has never been repaired.

(*See* Plaintiffs' Exhibit 17 at page 2)

> When our home was delivered and set up, the set-up crew did not install the king beam as your set-up manual specified. . . .
>
> The tie-downs and anchors were not installed according to your set-up manual. . . .
>
> The ducts were never tied up. . . .

(*See* Plaintiffs' Exhibit 17 at page 3)

Plaintiffs' Exhibit 17 also listed complaints addressed at trial for which Vintage could conceivably be responsible. These complaints, again in excerpts using plaintiffs' own words, were as follows:

> *The refrigerator must be replaced.* It will not keep our food below 50 degrees

(Plaintiffs' Exhibit 17 at page 1) (emphasis added)

> *The shower door must be replaced.* It will not close and water comes out of it when shower is used.

(Plaintiffs' Exhibit 17 at page 2) (emphasis added)

> *There are several problems with the blown ceiling.* Every seam on the sheetrock is applied too heavy and is cracking all the way across the ceiling in the hall bath. In the front bedroom it appears the stipple machine ran out of stipple as it is applied so thin that the bare unfinished sheetrock is showing through. This is another major item we paid extra for and got very sloppy workmanship.

(Plaintiffs' Exhibit 17 at page 2) (emphasis added)

Thus, there were three alleged "manufacturer's defects" that had been communicated to Vintage before trial and were alleged to be significant at trial: (1) the refrigerator; (2) the shower door; and (3) the stipple ceiling.

As to the refrigerator, this item was under separate warranty. In addition, Jerry Dodwell, a repairman sent to service the refrigerator, testified (1) that the dents of which plaintiffs complained could not have caused any damage to the cooling system and (2) that plaintiffs caused the cooling problem by improperly setting the refrigerator's dials. (T at 1235-53) Moreover, there was no evidence to suggest Vintage caused any dent in the refrigerator.

As to the second alleged manufacturer's defect - - the shower door - - even if it is assumed, *arguendo,* that this item was defective, it was undisputed that it would cost no more than $70 to repair. (T at 399)

The third alleged manufacturer's defect - - the stipple ceiling - - was the subject of much testimony at trial. John Searcy is the Chairman of the Alabama Commission on Manufactured [ie, Mobile] Homes. (T at 368-69) Mr. Searcy, who was retained by Vintage but called by plaintiffs, testified that the thin spots on the ceiling could be corrected by reapplying the stipple spray "with a small little hand machine that we've got." (T at 385) This procedure would cost $150 or less. (T at 386)

Plaintiffs' other expert - - Randall Chesser - - agreed that Mr. Searcy's method of correcting the ceiling was acceptable. (T at

799-802) Mr. Chesser also testified that an alternative method might be required if the standard method proved unsuccessful for some reason. The alternative method would cost $3,360 and would entail removing "the entire ceiling throughout that trailer and put[ting] a brand new ceiling in there. . . ." (T at 801) According to Mr. Searcy, however, that procedure would be highly impractical.[4] (T at 386-87)

Finally, with respect to the ceiling, there was undisputed evidence showing that Cantrell's set-up crew punctured the ceiling with a post during set-up. (*See* Plaintiffs' Exhibit 17, T at 1493) Therefore, even if the stipple had been applied to plaintiffs' satisfaction, the ceiling would have required repair.

In addition to the alleged manufacturer's defects, plaintiffs complained of alleged misrepresentations during their one telephone call with a Vintage employee (Bill Tucker) prior to their purchase of the mobile home. The alleged misrepresentations concerned two options in the mobile home: interior doors and wall paneling.

Plaintiffs apparently wanted solid interior doors, but instead received "hollow-core" doors. Plaintiffs' Exhibit 4 is the invoice for the mobile home. (T at 461) It does not represent that the home has solid interior doors; instead, it shows that Vintage never charged plaintiffs for the solid interior doors. (*See also* T at 404) Thus, the allegation of fraud as to the doors is wholly without merit.

Similarly, the testimony regarding the wall paneling reflects nothing more than confusion. Plaintiffs requested an upgrade

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[4] It should be noted that Vintage attempted to repair the ceiling through the method both experts found acceptable. Vintage requested that Cantrell have a sheetrock worker repair the ceiling and bill Vintage for the work. (T at 1458) Pursuant to that request, Cantrell did send John Shaw to work on the ceiling. (T at 612) Shaw, for reasons that remain unclear, failed to perform the repair, but Vintage was unaware of that fact. (T at 1469-73)

from the standard paneling offered in Vintage mobile homes. That option is listed in Vintage's invoice as "¼" Maple Paneling." (*See* Plaintiffs' Exhibit 4, T at 461) The listed price is $280. (*See* Plaintiffs' Exhibit 4.) The ¼" maple paneling is an upgrade from Vintage's standard 3/16" paneling, and the upgrade paneling is real wood (luan) with a maple film cover. (T at 1208-1209)

Mrs. Jaye did not discuss with Bill Tucker the type of veneer on the wood, but she assumed that it would be maple. (T at 1146-47) Mr. Tucker, even according to Mrs. Jaye, said only that the paneling was "one-quarter inch wood paneling." (T at 965)

With this background in place, Vintage will turn to the legal issues presented, highlighting additional facts where necessary.

APPENDIX G

EXCERPT FROM PETITIONER'S ALABAMA SUPREME COURT APPELLATE BRIEF RELEVANT TO DUE PROCESS

Alabama's Constitution proscribes the assessment of excessive fines. *See* Article 1, Section 15 of the Constitution of Alabama of 1901. The Eighth Amendment of the United States Constitution contains an analogous prohibition. The award of punitive damages in this case is so excessive as to violate these constitutional provisons. In addition, "the lack of sufficient standards governing punitive damages awards in Alabama violates the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 6 of Constitution of Alabama of 1901." *Aetna Life Insurance Co. v. Lavoie,* 505 So.2d 1050, 1061 (Ala. 1987) (Houston, J., concurring specially).

An award of punitive damages is the equivalent of a "fine or penalty against the defendant." *Marigold Coal, Inc. v. Thanes,* 274 Ala. 421, 149 So.2d 276, 280 (1962). The function of punitive damages is not to compensate the victim, but rather to punish the defendant and deter others from similar conduct. *Trahan v. Cook,* 265 So.2d 125, 130 (Ala. 1972). Consequently, the constraints of the excessive fines clauses should apply. *See Alabama Power Co. v. Cantrell,* 507 So.2d 1295, 1308 (Ala. 1988) (Maddox, J., concurring); Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 Va.L.Rev. 139 (1986).

The conduct and harm alleged here do not merit a $500,000 sanction. Plaintiffs were disappointed in certain aspects of their mobile home. The record, however, shows that they were able to enjoy uninterrupted use of the home and that none of the alleged defects threatened their safety. Further, the award is out of line with awards in any remotely related case. Under these circumstances, the $500,000 punitive damage award is excessive

and not rationally related to any legitimate governmental interest.

Moreover, the current law leaving the amount of punitive damages to the jury's unfettered discretion provides insufficient direction and, thus, renders the imposition of punitive damages unconstitutionally vague. *See Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1656 (1988) (O'Connor, J., concurring). To cure this constitutional failing, this Court should provide clear guidance to the fact finder as to the applicable standards. *See Lavoie,* 505 So.2d at 1062 (Houston, J., concurring specially). Finally, because punitive damages are quasi-criminal in nature, a higher burden of proof should control. *Cf. Addington v. Texas,* 441 U.S. 818 (1979).[17]

[17] The recent decision in *Industrial Chemical & Fiberglass Corp. v. Chandler,* Nos. 86-381, 86-385 (September 30, 1988), refused to apply the excessive fines clause to civil cases. The United States Supreme Court has yet to resolve this issue, however. In addition, *Chandler* did not address the due process clause.

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Chapter 11
Case No. A89-09326
Judge Kahn

IN RE:

VINTAGE ENTERPRISES, INC.,

FEDERAL I.D. NO. 58-0703048,
DEBTOR.

VOLUNTARY PETITION

1. Petitioner's mailing address, located in DeKalb County, Georgia, is:

Vintage Enterprises, Inc.
3825 Northeast Expressway
Atlanta, Georgia 30340

2. Petitioner's principal place of business has been within this district for the preceding 180 days.

3. Petitioner is qualified to file this petition and is entitled to the benefits of the Bankruptcy Code as a voluntary debtor.

4. Petitioner intends to file the plan pursuant to Chapter 11 of Title 11, United States Code.

5. Exhibit "A" is attached hereto and made a part of this petition.

WHEREFORE, Petitioner prays for the entry of an order for relief and for such other relief as may be proper in accordance with Chapter 11 of Title 11, United States Code.

This 25 day of August, 1989.

LAMBERTH, BONAPFEL,
CIFELLI & WILLSON

BY: /s/ Paul W. Bonapfel
Paul W. Bonapfel
Georgia Bar No. 066550

BY: /s/ James Cifelli
James Cifelli
Georgia Bar No. 125750
Attorneys for Vintage
Enterprises, Inc.

Suite 400
1430 W. Peachtree Street
P.O. Box 7700
Atlanta, Georgia 30357
(404) 892-3400

I, Daniel Cashin, Secretary of Vintage Enterprises, Inc., the Petitioner named in the foregoing Petition, declare under penalty of perjury, that the foregoing is true and correct.

Executed on August 25, 1989.

/s/ Daniel Cashin
Daniel Cashin
Title: Secretary

APPENDIX I

EXCERPTS FROM JURY CHARGE RELEVANT TO PUNITIVE DAMAGES

The plaintiffs in this case are claiming damages from the defendants for an alleged legal fraud. If you are reasonably satisfied by the evidence that the defendants were guilty of a legal fraud or either of them as charged by the plaintiffs and that the plaintiffs were injured or damaged thereby, the plaintiffs would be entitled to recover for such actual damage as you find from the evidence they did suffer.

In addition to actual damages, the law authorizes a jury to award punitive damages in fraud or deceit actions if it is shown to the reasonable satisfaction of the jury by the evidence that the fraud or deceit was malicious, oppressive, or gross or a misrepresentation made with knowledge of its falseness or so recklessly done as to amount to the same thing and committed with the intent to injure and defraud.

If you are reasonably satisfied from the evidence that the defendants were guilty of a fraud or deceit as charged by the plaintiffs and that such fraud or deceit was malicious, oppressive, or gross and made with the intent to injure and defraud the plaintiffs and the plaintiffs did suffer injury or damages as a proximate result of such fraud or deceit, then in your discretion you may award the plaintiff punitive damages in addition to any actual damages you find from the evidence the plaintiffs did suffer.

If you are not reasonably satisfied by the evidence that the defendants were guilty of a fraud or deceit which was malicious, oppressive, or gross and made with knowledge of its falseness or so recklessly made as to amount to the same thing with the intent to injure the plaintiff, you could not award the plaintiffs punitive damages.

. . . .

Ladies and gentlemen, I will now instruct you on the law of damages. The burden is upon the plaintiffs to reasonably satisfy you from the evidence of the truthfulness of their claim. If after a consideration of all of the evidence in this case you are not reasonably satisfied of the truthfulness of the plaintiffs' claims, your verdict would be for the defendants. In this event, you would go no further. This would end your deliberations.

On the other hand, if after a consideration of all of the evidence in this case you are reasonably satisfied of the truthfulness of the plaintiffs' claims, your verdict would be for the plaintiff. In this event it will be necessary for you to arrive at an amount to be awarded in the verdict from which I will read to you and describe later in my charge.

I now give you the following rules of law to assist you in your deliberations in arriving at an amount in the event you find for the plaintiffs. The fact that I am charging you concerning damages should not be taken by you, however, as any indication that I think damages should be awarded or not.

The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount you must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs.